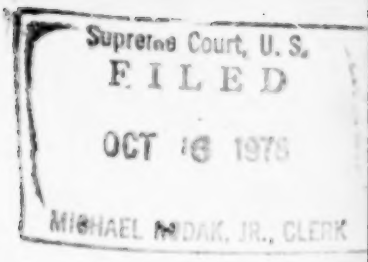

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-588

DE WAYNE EUGENE VAN WEY,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

SAVITZ & McCABE
Attorneys at Law
108 Ivy Street
San Diego, California 92101
Telephone: (714)
231-1181

By: Michael J. McCabe

Attorneys for Petitioner

TABLE OF CONTENTS

Opinion Below	1
Jurisdiction	2
Question Presented for Review	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	7
Appendix A - Opinion of the United States Court of Appeals for the Ninth Circuit	9
Appendix B - Statutory provisions pertinent to this case.	15
Declaration of Service by Mail	18

CASES

United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970) 5, 6

United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975). Cert. denied, 437 U.S. 832 5

SITES

21 U.S.C. section 841 2, 3
952 2, 3
960 2, 3
963 2, 3

28 U.S.C. section 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

DE WAYNE EUGENE VAN WEY,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, DE WAYNE EUGENE VAN WEY, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 9, 1978.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unreported. A copy of the opinion is attached and marked as Exhibit A. Petitioner's petition for rehearing with the suggestion for

rehearing en banc was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1978. A timely petition for rehearing and suggestion for hearing en banc was denied on September 8, 1978. A copy of the order denying the petition for rehearing and suggestion for rehearing en banc is attached and marked as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the district court erred in failing to instruct the jury on the effect of a variance between the government's pleading and proof with respect to a single versus multiple conspiracies.

STATUTORY PROVISIONS INVOLVED

This case involves 21 U.S.C. sections 841, 952, 960 and 963. These are reprinted in pertinent part in Appendix B.

STATEMENT OF THE CASE

On May 19, 1976, a superseding indictment was filed alleging that petitioner, eleven co-conspirators, and one previously indicted co-conspirator conspired to illegally import marijuana, to possess marijuana with intent to distribute, and to distribute marijuana, in violation of 21 U.S.C. sections 841, 846, 952, 960 and 963.

Petitioner was tried alone before a jury in the United States District Court for the Southern District of California. The government argued that taken together, the forty-seven overt acts alleged in the superseding indictment comprised one, single, overall conspiracy. Petitioner contended that evidence at trial was insufficient to establish a general conspiracy, and instead revealed the existence of three, distinct associations, only one of which was joined by petitioner.

Petitioner requested the trial court to instruct the jury:

"Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendant. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

"If you find that the defendant was a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find the defendant

guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

"In determining whether the defendant was a party to the alleged conspiracy charged, he is entitled to individual consideration of the proof respecting his participation, including any evidence of his knowledge or lack of knowledge, his status, his participation in the plan, scheme or arrangements alleged in the indictment.

REASONS FOR GRANTING THE WRIT

Consideration by this Court is necessary on the ground that the holding below conflicts in substance with the holding of the court in United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975). Cert. denied, 437 U.S. 832.

Whether single or multiple conspiracies existed is a jury question. United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970). The

requested jury instruction taken from Tramunti addresses the effect the jury's finding of more than one conspiracy should have on the particular defendant on trial. See, United States v. Tramunti, supra, at p. 1107.

Tramunti found that this instruction was sufficient to defuse any probability of prejudice arising from the possibility of a variance in that case. In the instant case, the charge to the jury instructed that the jury could find appellant guilty of any distinct conspiracy proved, regardless of whether it was the one charged in the indictment. [1]

The second Circuit approved the use of the aforementioned instruction in Tramunti to deal specifically with this issue. The opinion of the Ninth Circuit Court of Appeals in the decision below ignored petitioner's argument that it was error to refuse to give the requested

---

1/ The instruction dealing with the "multiple conspiracies" problem which was given by the Court reads as follows:

instruction. It is respectfully urged that the writ of certiorari be granted so that this important issue can be resolved.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to issue a writ of certiorari reviewing the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

SAVITZ & McCABE

Dated: October 3, 1978 By: _____
MICHAEL J. McCABE

Attorneys for Petitioner
DE WAYNE EUGENE VAN WEY

"Should you find beyond a reasonable doubt that the evidence in this case establishes a single overall scheme, you may find that there was a single conspiracy, even though the individual participants varied and the period of their activity overlapped. Although this indictment charges a single conspiracy, you may find that the evidence establishes separate conspiracies. Whether there was one conspiracy or a number of separate conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions.

Should you find that the evidence does not establish beyond a reasonable doubt that a single conspiracy but rather establishes beyond a reasonable doubt separate conspiracies, then you must determine the involvement, if any, of each of those defendants in the separate conspiracies which you find to have been proved."

"If you find that separate conspiracies have been proved beyond a reasonable doubt as related to the various overt acts, then in order to find one or more or all of these defendants guilty of the crime or conspiracy to illegally import and to possess a controlled substance with intent to distribute, the evidence must establish beyond a reasonable doubt that that defendant participated with another in some way or manner in the same conspiracy. I have instructed you as to consideration of acts and declarations of one alleged conspirator against another alleged conspirator. You will nct consider such acts or any declaration against any defendant unless you find beyond a reasonable doubt that that person doing the act or making the declaration was a participant in the same conspiracy as was that defendant. You, of course, will determine the guilty of each defendant separately with regard to each charge against him which I am submitting to you."

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 77-3761
Plaintiff-Appellee,	)	MEMORANDUM
vs.	)	
DE WAYNE EUGENE VAN WEY,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the Southern District of California

Before: BARNES and KENNEDY, Circuit Judges, and BARTELS, District Judge

Appellant Van Wey was convicted on a single count of conspiracy to import, possess with intent to distribute, and distribute marijuana. He claims that the indictment was duplicitous and at variance with the evidence adduced at trial because only one conspiracy was charged while examination of the overt acts and testimony reveals the existence of three conspiracies.

According to appellant, the first conspiracy involved Caron, Singdahlsen (appellant's room-

mate and a skilled pilot), Henrichsen, Marmon and Monroe, but not appellant himself, although he knew of the conspiracy. Two loads of Mexican marijuana were flown into the United States pursuant to this conspiracy, which ended when Caron shortchanged Singdahlsen and Singdahlsen decided to exclude Caron. The second conspiracy included appellant, Singdahlsen, Henrichsen and Curtis, and its members also succeeded in bringing two loads of Mexican marijuana into California. The disgruntled Caron, however, hijacked the second load after it was unloaded in the United States. This conspiracy ended when the authorities began closing in on Singdahlsen and appellant and they fled the area. The third conspiracy allegedly involved Curtis, Benfield (another pilot), Caron, Moore and Horsley who, according to overt acts 46 and 47 of the indictment, brought in one load of Mexican marijuana and attempted to bring in another after Singdahlsen and appellant had quit the scene.

This alleged third conspiracy may be disposed of at the outset, for the government introduced no

evidence with respect to it and the overt acts in the indictment which referred to it were excised from the indictment given to the jury. If it was error to include these overt acts dealing with a "third conspiracy" in the indictment, the government's election not to proceed on this conspiracy rendered such error harmless. See United States v. Goodman, 285 F.2d 378 (5th Cir. 1960), cert. denied, 366 U.S. 930 (1961). We need only consider appellant's claims of variance and duplicity with respect to the first two conspiracies he claims were proved.

Whether there was one conspiracy or two conspiracies was a question of fact for the jury. United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). We believe there was sufficient evidence for the jury to find that there was but a single conspiracy with certain additions to and withdrawals from the personnel involved. See id.; United States v. Green, 523 F.2d 229 (2nd Cir. 1975), cert. denied, 423 U.S. 1074 (1976). Thus there was no variance between the indictment and the

proof. See United States v. Baxter, 492 F.2d 150 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973), cert. denied, 416 U.S. 940 (1974). Assuming the evidence revealed the existence of two conspiracies, as appellant alleges, the variance between the indictment and the proof would not have been fatal. Under Fed.R.Cr.P. 8(a), the two conspiracies could have been charged in separate counts of the same indictment, and since there was sufficient evidence to find that appellant joined the first conspiracy by driving Singdahlsen home from the airport after the second run for $100, appellant could have been found guilty of both conspiracies. United States v. Dunn, 564 F.2d 348 (1977). Appellant would accordingly have no claim that evidence with respect to the first conspiracy was improperly introduced at trial. Assuming the existence of two separate conspiracies, the government's decision to charge them as a single conspiracy did not prejudice appellant in this case, particularly in view of the trial judge's instructions on single and multiple conspiracies. Berger v. United States,

295 U.S. 78 (1935); United States v. Baxter, supra; United States v. Griffin, 464 F.2d 1352 (9th Cir.), cert. denied, 409 U.S. 1009 (1972).

Appellant further contends that the indictment was duplicitous, in that it actually charged three conspiracies in a single count. See United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). Technically speaking, the indictment was not duplicitous, because it charged only a single conspiracy. Indeed, had the government divided the indictment into separate counts in the manner suggested by appellant, the indictment might have been attacked for multiplicity. While the evidence and the court's charge had the practical effect of presenting to the jury the question of whether there was more than one conspiracy in this case, we do not believe that appellant was prejudiced thereby. The trial judge clearly instructed the jury with respect to the necessity of reaching a verdict on one of the conspiracies in which appellant participated, if more than one conspiracy were found. Nor do we foresee

any problems raising a double jeopardy defense in a potential future action.

The judgment of conviction is accordingly affirmed.

APPENDIX B

APPENDIX B

Section 841 of Title 21, United States Code, provides in part as follows:

". . . it shall be unlawful for any person knowingly or intentionally --

"to . . . possess with intent to . . . distribute, . . . a controlled substance; . . . ."

Section 952 of Title 21, United States Code, provides in part as follows:

(a) "It shall be unlawful . . . to import into the United States from any place outside thereof, . . . any controlled substance, ..."

Section 960 and 963 of Title 21, United States Code, provide in part as follows:

"Any person who attempts or conspires to commit any offense defined in this title. . ." is guilty of an offense.

DECLARATION OF SERVICE BY MAIL

I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 108 Ivy Street, San Diego, California.

On October ____, 1978, I deposited in the U.S. Mail, at San Diego, California, in the within-mentioned entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR DE WAYNE EUGENE VAN WEY, Petitioner, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under pendalty of perjury that the foregoing is true and correct. Executed on this ____ day of October 1978, at San Diego, California.

Lynn Rusch
Lynn Rusch
Secretary to Michael
J. McCabe
SAVITZ & McCABE